No. 48179-1-II

STATE OF WASHINGTON COURT OF APPEALS, DIVISION II

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*In re:*

JULIE BRANNBERG,

*Respondent,*

v.

JOSEPH BRANNBERG,

*Appellant*

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ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT

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# OPENING BRIEF OF JOE BRANNBERG
**Corrected**

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Gregory M. Miller, WSBA No. 14459

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

*Attorneys for Appellant*

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## I. INTRODUCTION

A domestic violence protection order ("DVPO") issued under the Domestic Violence Prevention Act ("DVPA" or "Act"), Ch. 26.50. RCW, requires findings of domestic violence as defined by the statute, which is designed to provide immediate relief from a genuine risk of imminent harm, *i.e.*, a reasonable fear of imminent bodily harm. A protection order based on findings and conclusions that do not meet these requirements must be vacated. That is required here because the written findings and conclusions (App. A hereto) are facially insufficient to support a DVPO under the statute.

FOF 9 concludes that the 2015 event with one daughter "does constitute domestic violence," but then goes on to make a factual determination that does ***not*** meet the statutory definition; it finds the 2015 event was "**not** an event that would have lead a reasonable individual to believe they were at risk of imminent bodily harm." FOF 9, CP 216 (emphasis added). FOF 10 flatly concludes that "the incident from August 2014 [with another daughter] does **not** constitute domestic violence." CP 216 (emphasis added). It states that Joe Brannberg appeared to lack "the appropriate parenting skills to manage his frustration with his children." *Id.* The finding does ***not*** state Joe puts them in a reasonable fear of imminent physical harm.

This leaves only an incident from August 2012, which the findings state does constitute domestic violence in FOF 11 and 12. However, it is too old provide the basis for an *imminent* fear of harm

three years later in March, 2015. If emergent protective action against reasonably feared imminent physical harm, bodily injury, or assault was needed from that incident, it was needed in 2012, not three years later. Further, the alleged "trigger" for making the outdated incident current, the 2015 incident, is both: 1) wholly different is nature and type with no physical touching or threat of same, and so could not reasonably incite a fear of repetition of the very different 2012 incident; and 2) the 2015 incident itself is characterized as "***not*** an event that would have lead a reasonable individual to believe they were at risk of imminent bodily harm." If the daughter in the 2015 incident could not reasonably be put in reasonable fear of the statutory level of imminent risk of bodily harm, neither could a different daughter who was not even the subject of the event be placed in the statutory level of a reasonable fear of ***imminent*** risk of bodily harm to her.

While a trial court may err on the side of imposing protective measures based on only an unsubstantiated fear that some future harm might possibly occur, the appellate courts must vacate such orders because that is not the legal test. This is critical because DVPO's are commonly sought in parenting situations as the preliminary step: 1) to begin, and provide the foundation for, divorce and parenting proceedings; or 2) to begin, or provide the foundation for, modification proceedings. In both cases (and as this case illustrates) the goal is to get full control over the children by painting

the other parent as a danger in an expedited proceeding with no discovery, relaxed evidentiary standards, and emaciated due process rights, including no right to cross-examination. This truncated procedure is only acceptable where the goal is to provide short term relief from the prospect of ***imminent*** harm pending full examination of the circumstances in the parenting plan action.

That tactic was first tried by Respondent Julie Brannberg in 2008 to gain the children in the coming divorce, but was foreclosed when the DV petition was dismissed after an evidentiary hearing. Six years later she is trying the same tactic to gain advantage in a modification action, which was filed only after the initial temporary DVPO was issued on March 19, 2015. It too should have been dismissed for failing to meet the statutory standard.

Because DVPO's are meant to be a critical form of protection in potentially dangerous situations that are imminent, and not used as a standard tactic to gain advantage in parents' fight over children, the courts must be vigilant to enforce the law and maintain a proper balance that insures parent-child relationships are not needlessly and irreparably damaged by making sure that such orders are vacated where, as here, the imminent harm standard is not genuinely met. Because the statutory standard was not met the DVPO must be vacated and the 2009 parenting plan restored pending any modification in the parenting action.

## II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

### A. Assignments of Error

1. The trial court erred by entering the domestic violence protection order.

2. The trial court erred by concluding there were recent acts of domestic violence when the findings of fact do not meet, or preclude meeting the statutory standard.

3. The trial court erred by altering the 2009 parenting plan based on a legally insufficient DVPO.

4. The trial court abused its discretion in conducting the hearing on the protection order by arbitrarily restricting the evidentiary time granted the parties where that restriction prevented Appellant Joe Brannberg from examining a critical witness, thus also depriving the court of sufficient necessary information to make a correct, fair, and just decision.

### B. Issues on Appeal

1. A lawful DVPO must have sufficient factual findings from admissible evidence to meet the legal criteria for issuing an order under Ch. 26.50 RCW. Must the DVPO here be vacated because the Findings of Fact, even assuming they are supported by substantial admissible evidence, do not support the conclusion of recent acts of domestic violence based on a reasonable fear of imminent risk of physical harm from which the two daughters need to be protected and, therefore, do not support the DVPO? AE 1, 2.

2. Must the DVPO be vacated because the findings of fact support, at most, a conclusion of one instance of domestic violence in August, 2012, and the findings and conclusions preclude a ruling that the alleged incidents in August 2014 and March, 2015 constitute domestic violence, such that the findings and conclusions do not support the requirement of a need for immediate protection pending modification proceedings in the parenting matter, and thus do not support the judgment of entering the DVPO? AE 1, 2, 3.

3. Is reversal required because the findings of fact are, on their face, legally insufficient to support a DVPO? AE 1, 2.

4. Where a trial court relies on a legally insufficient DVPO to change a six-year permanent parenting plan to deprive a parent of contact with two of the four daughters with a temporary parenting plan, must that temporary parenting plan be vacated and the permanent parenting plan restored pending a lawful modification hearing? AE 3.

5. Must the DVPO be vacated because the commissioner abused his discretion when he arbitrarily limited the DVPO hearing to one hour which had nothing to do with the nature or extent of issues and evidence in the case, but because the commissioner stated that "I don't do two-day trials" where that limitation precluded live testimony and cross-examination of key witnesses necessary for the court to have a full understanding of the circumstances, thus depriving Appellant of a fair hearing? AE 4.

## III. STATEMENT OF THE CASE

### A. Procedural Facts.

Joe and Julie Brannberg divorced in 2009 following the birth and initial raising of their four daughters.[1] An agreed parenting plan was entered at that time which provided for equal parenting time with the parties exchanging all four children every Sunday at 6 pm. CP 215 ¶2; Supp CP __ - __ (2009 Parenting Plan, to be provided).

On March 19, 2015, Julie filed for a protection order. CP 15-25, which was entered that day following a brief hearing at which Joe was unrepresented. *See* CP 26-29; I RP. Hearings were held before Commissioner Jonathan Lack on March 19, May 6, May 20, and May 27, 2015 and revision hearings were held before Judge Christine Schaller on September 11 and 25, 2015. *See* RP's I-6.[2]

Findings of Fact and Conclusions of Law and the one-year DVPO were entered on June 24, 2015. CP 215-218; 219-223. The order denying Joe's motion to revise was entered on September 25, 2015 (CP 235-236) and this appeal was filed on October 21, 2015. CP 237-249. Although the DVPO is set to expire on June 23, 2016 (*see* CP 215), Joe believes Julie will seek to renew it under RCW 26.50.060(3). For that and other reasons the matter is not moot.

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[1] The parties are referred to by their first names for clarity. The daughters will be referred to by their first names due to similarity of initials.

[2] Each transcript has its own pagination so the transcripts are identified chronologically:, I RP for March 19; II RP for May 6; III RP for May 20; IV RP for May 27; V RP for Sept. 11; and VI RP for Sept. 25.

## B. Substantive Facts.

### 1. Joe's and Julie's marriage and four children.

Joe and Julie Brannberg met in college and married in 1992. CCP 8.[3] They had four daughters, Moriah, Kendra, Megan, and Kaelyn, born in 1998, 2001, 2004, and 2006. *Id.* Julie stayed at home with the children while Joe worked until she sought contract work in 2004 and returned to work full time in real estate in 2007. CCP 9.

The GAL at the time of the divorce described the marriage as "rocky from the start" with claims by Julie of power and control issues with Joe, while Joe complained Julie never seemed committed. CCP 8. Julie admitted to an affair in 1995 which she disclosed to Joe, that she moved out for a year, and that the couple tried to repair their relationship, including describing to the GAL that Joe forgave her "as part of what she called a spiritual transformation." CCP 8; 10. Joe ultimately got over her affair and recommitted to the relationship, but believed Julie "always had one foot out the door." CCP 10. The marriage had many stressors including the leukemia diagnosis of one of the daughters in 2007 (CCP 9), and ultimately did not succeed.

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[3] The May 19, 2009 Final Report of the Guardian Ad Litem in the underlying divorce and parenting action was filed under seal in this matter and is designated as "Confidential CP", which will be abbreviated to "CCP". Because it is filed under seal it will not be quoted extensively but used to document facts. The Court is encouraged to review it in detail as the most complete and unbiased background to these matters.

The GAL describes an incident in late November 2008 while the family drove to Joe's family for Thanksgiving involving an argument over cell phone use in the car. CCP 9. That incident provided the basis for Julie to get a temporary DVPO *ex parte* against Joe while he was out of town, and she moved with the children to a separate residence. CCP 9.

**2. Julie's 2008 effort to get a full DVPO against Joe, which was rejected by the Court after full hearing.**

In December 2008, Julie sought a DVPO protecting both herself and their four daughters under Thurston County Superior Court No. 08-2-30895-0 (CP 148: 15-23), preliminary to seeking a divorce and custody of all four children. *See* CCP 9. Julie's request for the full one-year DVPO was denied and her petition dismissed after a full evidentiary hearing on December 26, 2008. *Id.* The divorce followed.

**3. The divorce and 2009 permanent parenting plan providing for full shared custody without any restrictions on either parent.**

The GAL reported that in the divorce proceedings the temporary orders called for the children to "alternate time with each parent, week-on, week-off" and by agreement they initiated a mid-week visit to the alternate parent, and other agreed accommodations. CCP 9. The GAL recommended that full-shared custody plan of week-on, week-off stay in place, with additions as agreed by the parties, such as the mid-week visits to alternate parents, and "joint

decision-making in all areas." CCP 9. The report is particularly interesting for the fact that despite the conflict between the parents, each made numerous statements to the GAL that the other parent was a good parent and they had no concerns for the children's safety when in their care.[4] Nevertheless, Julie told the GAL in her interview that she wanted primary custody for reasons the GAL characterized as "not very clear," CCP 10, and her proposed parenting plan called for sole decision-making by her (though in the interview she told the GAL joint decision-making was "appropriate in all areas," CCP 11), and suggested Joe's visitation "be supervised by his parents," CCP 11, all of which she moved away from as the divorce proceeded and in her conversations with the GAL.

The daughters were ten, seven, five, and two when interviewed by the GAL (CCP 15), and were ten, eight, five, and three when the parenting plan was entered. Supp. CP __. Based on the ages in the permanent parenting plan, the girls were 16, 14, 11, and nine, respectively, at the time of the DVPO hearing in June, 2015, and are 17, 15, 12, and 10 now.

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[4] *Eg.*, "Joe said that Julie is a good mom and really loves the kids" (CCP 10); "Julie went on to say that she had no concerns about the girls' emotional or physical safety while in his care," (CCP 10); "she indicated that he was a good father and that she really did feel that a 50:50 arrangement was in the girls' best interest" (CCP 11).

In addition, the GAL summarized Julie's therapist's account that "Julie truly did believe Joe was a good father and not emotionally abusive to the girls." CCP 13.

Following the GAL's recommendations, thus, the final, agreed permanent parenting plan entered June 2, 2009, provides for completely shared custody with alternating weeks of residential time and joint decision-making. *See* CP 215; I RP 4:14-22; Supp. CP __. It has no findings or restrictions under RCW 26.09.191 restricting either parent's contact with or rights as to the children. *See* Supp. CP __ - __.

In short, with entry of the 2009 plan, both parents were, as a matter of law, determined to be fully fit parents to raise their daughters, with all the rights and obligations that go with that determination. This is significant after the 2008 proceedings against Joe, especially since the children were young girls ranging from three to ten years old, and that Julie got no deference as mother, despite the girls' tender years and Julie's allegations against Joe.

**4. Six years of fully shared custody and Joe jointly raising the four girls since January, 2009.**

The 2009 permanent parenting plan governed the relationships of the parties with their daughters until Julie obtained the temporary restraining order on March 19, 2016. There were no court proceedings relating to parenting in the interim. No allegations of improper behavior were made against Joe during that entire period. Interestingly, an incident arose in August 2014 related to Kendra, then 13, and whether she was depressed and contemplating suicide. Julie chose not to raise an allegation against Joe then or

shortly thereafter. She did include the incident in her petition in March, 2015, though the commissioner stated he was not concerned with it when considering whether to issue an emergency order on March 19. *See* I RP 7:21-25.

### 5. Julie's new effort to get a DVPO in March, 2015, on an emergency basis as to only two of the four daughters: March 19, 2015 hearing.

Based on an incident on March 15, 2015, in which Megan was being stubborn about completing her homework before returning to Julie's house and Joe dealt with "a difficult parenting moment" (*see* I RP 9:17-19), Julie's attorney filed an emergency motion for a temporary protection order on March 19 and represented Julie at the hearing on the March 19th. *See* CP 6-29; I RP. The petition was filed only as to Kendra and Megan, not as to the oldest and youngest daughters, *id.,* and the commissioner was told a petition to modify the parenting plan "was in the works." I RP 4:8-11. Joe was given only enough notice for him to get to the hearing, was shown the petition "just moments" before it began (I RP 4:2), then had to represent himself *pro se*.

Julie's lawyer confirmed that the requested protection order was only as to the two middle daughters, Kendra and Megan, but not as to the oldest, Moriah then 16, nor the youngest, Kaelyn, then nine years old. I RP 9. When asked why not by Commissioner Lack, Julie's attorney Mr. Hill stated that "we're going to be addressing it

in the modification" (I RP 9:5-6). This showed both that the DV proceedings were a precursor to Julie's planned modification effort to get control of all the daughters, as in 2008, and that there was no colorable claim or need for protection for their youngest daughter, Kaelyn. One must presume that if protection is needed from a parent who is genuinely harmful or has a current fear-inducing anger management problem that the youngest and most vulnerable child at age 9 also would need protection, if not also the oldest, then 16.

That a careful decision was made to not seek that relief is a significant admission of the weakness of Julie's claim of the two daughters' genuine need for immediate protection from Joe and indicative that the incidents in question are part and parcel of what virtually all parents go through raising their children: stubbornness; frustrations; and the changes that occur in adolescence, particularly with girls. As is seen *infra*, the inconsistent and inadequate findings of fact reflect this reality.

In the brief hearing, Commissioner Lack characterized the "stubborn homework incident" (the only allegation he concerned himself with) as "a difficult parenting moment . . . [in which Joe] may have responded in a way that placed the child in fear. I RP 9:18-19). The commissioner issued a temporary order because "I'm getting the impression that she had a fear. That's the basis for me to issue a protective order" despite also recognizing that "there's a lot more details that are going on here that probably need to be handled

in the parenting plan case, as opposed to a domestic violence protective order case." I RP 10:15-21. The temporary order was renewed in order to get the full hearing heard on May 20 and 27.

### 6. The struggle for Joe to get access to witnesses in order to present evidence critical to a proper decision by the trial court based on a full and complete picture, May 20 and 27 Hearings.

Joe obtained counsel who filed responsive materials, including a sealed copy of the final GAL report from May, 2009, when the divorce was being concluded. *See* Confidential CP 6 – 18 ("CCP"). Joe's attorney made strenuous efforts to get sufficient evidence to address the claims made by Julie and had difficulty getting the therapists and counselors who Julie had engaged to meet with or otherwise provide information to him so he could prepare his case. This is reflected in the short May 6 hearing (*see* II RP) and again in the full hearing broken up between May 20 and May 27, III RP and IV RP. Most of the witness testimony occurred on May 20.

Despite the issues raised by Joe's counsel related to getting full and accurate information in order to proceed and have a fair hearing with "a full and fair opportunity to be heard" (*see* II RP 17:13 18:18[5]) the commissioner stated the evidentiary hearing and

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[5] Joe's counsel stated:

> I can call witnesses. I can't do discovery. The case law is clear on that. We can't do any discovery in these cases . . . But my client has a right to be able to call whoever it is he wants to testify for the benefit of this case. And if I want to call adverse witnesses in the form of these three counselors, . . . I should have the right.

*(Footnote continued next page)*

argument would be limited to one hour of time allocated to each party. II RP 6:6-7, p. 9:19-25, p. 19:17-19; III RP 18-19. When more time was raised by Julie's counsel Mr. Hill to accommodate the materials being submitted, Commissioner Lack stated simply: "well, I don't do two-day trials." II RP 10:9. Rather than operating DV hearings akin to trials, the commissioner described them as like making cioppino: "Well, that's the DV process. Everyone just tosses their leftover fish in, and I have to process it." II RP 16:18 – 17:1. The bottom line was that each party would have one hour total of time and, in this case, it was broken up over two hearing dates because of the difficulties Joe's attorney had in getting testimony from the professional witnesses. There was no pretense that adequate time was allotted.

### 7. The findings of fact, conclusions of law, and protection order issued June 24, 2015.

The commissioner wrote his own findings and conclusions and issued the DVPO on June 24, 2015, good for one year. CP 215-223. They are attached as App. A hereto. As noted *supra,* they do not meet the legal standards required by the statute. Joe's counsel brought a motion for revision, which was heard September 11, and denied, with the order denying revision entered on September 25. This appeal followed.

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II RP 18:8-18.

## IV. ARGUMENT

### A. Standard of Review and Decision Under Review

The standard of review for granting a domestic violence protection order is abuse of discretion. *In re Marriage of Stewart*, 133 Wn. App. 545, 550, 137 P.3d 25 (2006). It is an abuse of discretion to apply an incorrect legal standard, or to issue an order if the facts are not sufficient to meet the requirements of the correct legal standard. *Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997);[6] *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) ("*Fisons*") (application of the incorrect legal standard is an abuse of discretion, reversing for use of incorrect standard).

Here the error is that the findings and conclusions do not meet the requirements of the correct legal standard for issuing a DVPO, and that error requires reversal.

Where the superior court denies revision of a commissioner's ruling, the superior court adopts all unrevised rulings. RCW 2.24.050 (where a commissioner's rulings are not revised, "the orders and judgments shall be and become the orders and judgment of the superior court"). Denial of revision without making findings of its own, as occurred here, means the superior court "adopts the

[6] "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."

findings, conclusions, and rulings as its own." *State ex rel. J.V.G. v. Van Guilder*, 137 Wn. App. 417, 423, 154 P.3d 243 (2007), citing *Estate of Larson*, 36 Wn. App. 196, 200, 674 P.2d 669 (1983), *rev'd on other grounds,* 103 Wn. 517, 694 P.2d 1051 (1985). *Accord, State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004).

Normally, the role of the appellate court is to determine whether substantial evidence supports the findings of the trial court and whether those findings support the conclusions of law and the judgment. *Group Health Coop. of Puget Sound, Inc. v. Department of Rev.*, 106 Wn.2d 391, 397, 722 P.2d 787 (1986) . Here, review is limited to whether the findings as entered and unrevised support the conclusions of law and whether the supported conclusions support the judgment. If the conclusions of law do not meet the predicate legal standard, then the judgment must be vacated. *Lian v. Stalik*, 106 Wn. App. 811, 827-28, 25 P.3d 467 (2001) (reversing where conclusions of law did not support the judgment).

Hearings for DVPOs are conducted as "special proceedings". *Scheib v. Crosby*, 160 Wn. App. 345, 349-353, 247 P.3d 816 (2011), relying on *Gourley v. Gourley*, 158 Wn.2d 460, 469, 145 P.3d 1185 (2006), *State v. Karas,* 108 Wn. App. 692, 699-700, 32 P.3d 1016 (Div. II, 2001) (rejecting argument DVPA is unconstitutional for having insufficient procedural due process protections), and *Blackmon v. Blackmon,* 155 Wn. App. 715, 720-723, 230 P.3d 233 (Div. II, 2010) (no constitutional right to a jury trial in DVPO

hearing). The extent of limits placed on such hearings is reviewed for an abuse of discretion. *Schreib v. Crosby,*160 Wn. App. at 352-353. The same standards on abuse of discretion apply as noted above: it is an abuse when the decision is manifestly unreasonable, untenable, made on an untenable basis, or for untenable reasons, *Marriage of Littlefield*, 133 Wn.2d at 47; and a trial court abuses its discretion if it bases its decision on an incorrect legal standard. *Fisons,* 122 Wn.2d 299 at 339.

Here the abuse of discretion by the Commissioner was in how he held the hearing by using an arbitrary time measure to limit the hearing and exclude important evidence necessary for a proper, if limited, hearing that would fulfill the fair hearing purpose of the DVPA. That limitation only makes sense is the goal is to simply get done with some sort of a hearing before granting pre-ordained protection order, as opposed to having a fair hearing. While our cases have limited the constitutional elements of due process which are required in a given DVPO hearing, they have affirmed that the hearing nevertheless has to be a fair one. *Schreib.* And to be fair it cannot be subject to arbitrary time limits which exclude evidence that is material and necessary for the trial court to get to the truth. Rather, the trial court has discretion for just that purpose, to insure that the necessary amount of time and number of witnesses, or discovery or cross-examination are provided as is needed under the circumstances. Because this discretion was not exercised by the trial

court, that failure to exercise discretion meant the hearing was not sufficiently fair and the DVPO must be vacated.

### B. What's At Stake: Getting Control Of The Children Under A Modified Parenting Plan By Establishing A "History Of Domestic Violence" Via A Judgment Obtained Under Proof That Would Not Be Accepted In A Parenting Action.

It is important to emphasize directly what is at stake in these kind of proceedings, and why the "relaxed" procedural requirements which normally help to insure getting to the truth are dangerous when they determine later actions in which that relaxed proof would be inadequate.

The Parenting Act embodies our state's policy favoring the maintenance of relationships between parents and children in setting residential schedules. First, the legislature expressed in a general policy statement that "[t]he state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests." RCW 26.09.002. Second, the legislature specifically required courts to "make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child." RCW 26.09.187(3). This protection order action is, admittedly by Julie, a preliminary step to seeking modification of the parenting plan under the Parenting Act. The

rulings on the DVPO must be viewed from that perspective, particularly since the grant of the one-year order also modified the parties' 2009 parenting plan.

A court "may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191." *Marriage of Katare*, 125 Wn. App. 813, 826, 105 P.3d 44 (2004). Before imposing restrictions, the court must find a nexus between the parental conduct that supports the restriction and an ***actual or likely*** adverse impact of the conduct on the children. *Marriage of Watson*, 132 Wn. App. 222, 233-34, 130 P.3d 915 (1996). The restrictions must be "reasonably calculated to protect the child from the physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time." RCW 26.09.191(2)(m)(i). *See also Katare*, 125 Wn. App. at 826. *Marriage of Chandola*, 180 Wn.2d 632, 643, 327 P.3d 644 (2014), clarified that any restrictions imposed must, in fact, be ***necessary*** to protect the child from "a specific, and fairly severe, harm to the child." *Id.* at 648. *Chandola* made clear that the statute is not merely a magic want that allows judges to impose restrictions as they wish with impunity. Instead, there must be findings supported by admissible evidence that the restriction is "necessary" to protect the child from a "specific, and fairly severe, harm to the child." *Id.* "Possible" harm simply does not cut it.

The alleged harms authorizing restrictions of parenting plans cannot be merely "possible" or "feared" by the parent in question, even though that fear or concern of possibility is genuine. Rather, the feared harm must in fact be ***likely*** to occur. Mere "possibility" is not enough. After all, virtually anything is possible given sufficient imagination or anxiety.

In this case the findings of fact give no such basis for restricting Joe's contact with his girls given their equivocation and lack of clear determination. ***First***, the findings as to the March 2015 incident are inconsistent and cannot be reconciled and therefore do not provide a factual basis that meets the statutory requirement. Finding 9 states that incident, while it may have been

> disturbing to the children and . . . an inappropriate response to a frustrating situation, it is ***not*** an event that would have lead a reasonable individual to believe they were at risk of imminent harm.

FOF 9, CP 216 (emphasis added). This finding is, as a matter of law, insufficient to sustain the later conclusion of law in ¶15 that "the event of March of 2015 . . . constitute[d] domestic violence and . . . [is a basis] to issue a protective Order. CP 217.

***Second***, the conclusion as to the August, 2014 is also equivocal and therefore, as a matter of law, also is insufficient to support a DVPO. That conclusion states that "the incident of August 2014 ***probably*** constitute[s] an act of domestic violence placing Kendra in immediate fear of imminent bodily harm." ¶15, CP 217-18. But

"probably" does not cut it. "Probably constitutes an act of domestic violence" falls short of the legal basis required to interfere with the relationship between a parent and his child. It lacks sufficient certainty to allow the courts to trench on Joe's rights, and to remove two of his daughters from contact with him.

***Third,*** even if the findings as to the alleged August 2014 and March 2015 incidents supported findings of domestic violence under the statute, which neither one does, they could only support restrictions as to the daughter in question: Kendra as to August 2014; and Megan as to March 2015. But since there is a factual deficiency as to the 2015 findings, there can be no DVPO as to Megan. And similarly, as there is a deficiency as to the August 2014 conclusion, there can be no DVPO as to Kendra.

The Parenting Act presumptively requires a court to impose restrictions in a parenting plan where it finds that a parent has engaged in "a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous harm or the fear of such harm." RCW 26.09.191(1). In such a case, the court may not provide for mutual decision making or a dispute resolution process other than court action. RCW 26.09.191(1), .187(1), .187(2)(b)(i). In addition, the court must limit the parent's residential time with the child. RCW 26.09.191(2)(a);

*see also* RCW 26.09.187(3)(a).[7] Thus, if these proofs are established, a parent such as Joe who has been raising his daughters for their entire lives, including the six years following the divorce, is at risk for losing time with his children if he has, in fact, engaged in a series of acts of domestic violence.

This requirement for parenting plan restrictions if there is a demonstrated history of domestic violence shows that Julie was in fact trying to set up a modification in which she would gain primary, if not total control over the children. There is no requirement of showing a ***history*** of domestic violence in order to get a DVPO. Rather, the focus for those proceedings is simply the immediate need for protection from demonstrated, imminent harm or threats. But, necessarily, if a person's goal is to win the modification proceeding with the DVPO (as opposed to seeking to maximize the best interests of the children which includes the maximum contact with their other parent), then larding up the petition with a so-called "history" of domestic violence dramatically advances that ultimate goal of winning the modification early. The DVPO proceeding becomes especially important to bring and win because it has a lower burden of proof, dramatically relaxed evidentiary standards, little or no discovery, and relaxed due process requirements including not guaranteeing cross-examination. *See, e.g., Gourley v. Gourley*, 158

[7] Restrictions are not mandatory if the court finds that contact between the parent and child will not cause harm. *See* RCW 26.09.191(2)(n).

Wn.2d at 467-470 (no due process or other right to cross-examination). It is thus a fast and easy way to get a final determination favorable to the aggressive party who seeks relief under the DVPA which is often determinative in the later modification proceeding, despite the different proof requirements.

Although the Parenting Act does not define "a history of acts of domestic violence," its use of the phrase "a history of acts," including the plural word "acts," means that a single act of domestic violence is not a sufficient basis to impose restrictions under RCW 26.09.191(1) or (2)(a).[8] It thus become critical for a parent who wants to gain control of the children to present the modification court with more than one adjudicated act of domestic violence that fits both the criteria of the statute and are established under the stricter proofs required under the Parenting Act, which includes the right to cross-examine witnesses as well as the right to make a full evidentiary presentation, both essential components of due process which were denied Joe in the DVPO hearing. Adjudicated DV acts under a DVOP become automatic proof in the modification.

The "history of acts" phrase also ***excludes*** "isolated, *de minimus* incidents which could technically be defined as domestic

[8] In interpreting a statute, "[t]he court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

violence." *Marriage of C.M.C.*, 87 Wn. App. 84, 88, 940 P.2d 669 (1997), *aff'd sub nom. Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1998). The court must find based on a preponderance of the evidence that there is "a history of acts of domestic violence"; mere accusations, without proof, are insufficient to impose restrictions under section .191. *Caven*, 136 Wn.2d at 810. "Domestic violence" is defined as follows:

> "Domestic violence" means: (a) ***Physical harm***, bodily injury, assault, or the ***infliction of fear of imminent physical harm***, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010(1) (emphasis added).[9]

By getting adjudication of a history of acts of DV in a DVPO proceeding, the parent can avoid the procedural safeguards and evidentiary standards that are supposed to control and protect both the other parent and the child, who will have her parent-child relationship severed. This is the intent and the mischief behind this DV proceeding, and it is why the order must be vacated, because it otherwise will improperly skew the modification proceeding, even though the legal requirements of the modification statute have not

[9] This "legal definition" is narrower than the clinical or "behavioral definition" used in the field of domestic violence treatment. *See* D.V. MANUAL FOR JUDGES 2-2 (Wash. State Admin. Office of the Courts, 2006); *see also* RP 203 (GAL Hodges).

been met. The DVPO here is, unless vacated, *res judicata* of "a history of domestic violence."

## C. The Findings And Conclusions Do Not Meet The Requirements To Support The Legal Conclusion Under The Statute That Joe Committed Recent Incidents Of Domestic Violence And Thus Do Not Support Entry of the DVPO, Which Must Be Vacated.

### 1. Finding 9 specifically states that the 2015 incident does not constitute domestic violence because the 2015 event was not an event that would lead a reasonable person to believe they were at risk.

As outlined *supra,* the findings in FOF 9 undercut the conclusion at the beginning of the finding. It states:

> 9. The court finds that the incident in May of 2015 does constitutes [sic] domestic violence.[10] The incident was disturbing to the children and even by Mr. Brannberg's testimony constitutes an inappropriate response to a frustrating situation, **it is not an event that would have lead a reasonable individual to believe they were at risk of imminent bodily harm.**

CP 216, App. A-2 (emphasis added). RCW 26.50.010(3) defines domestic violence to mean: "(a) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members" in addition to sexual assault and stalking of family or household members. The bolded part of FOF 9 is the factual predicate for the conclusion at the

[10] Nominal findings of fact such as this sentence that are actually conclusions of law will be treated as legal conclusions. *See State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 266-67, 501 P.2d 290 (1972).

beginning of the paragraph that the 2015 incidents are domestic violence. But that bolded part, which are the facts found by the commissioner, plainly do ***not*** meet the statutory criteria.

Those findings do not show that Joe currently presents an immediate danger or threat to his daughters, or places them in imminent fear of serious physical harm, bodily injury, or assault, as the statute requires to sustain the order. FOF 9, as to the incident in March 2015, finds that it was "disturbing" to the children, constituted "an inappropriate response to a frustrating situation," but then goes to state that "it is **not** an event that would have lead a reasonable individual to believe they were at risk of imminent bodily harm." CP 216 (emphasis added). That finding, that it does ***not*** meet the DV definition, accords with the incident of a frustrated parent venting ***away*** from the stubborn child, not yelling in her face or striking her.

**2. Finding 10 expressly states the August 2014 event "does not constitute domestic violence."**

Finding 10 states as follows:

> 10. The court finds that the incident from August of 2014 **does not constitute domestic violence**. It appears that in this situation Mr. Brannberg lacked the appropriate parenting skills to manage his frustration with his children.

CP 216 (emphasis added).

This was Commissioner Lack's own order which he drafted, not one he received from one of the parties. It was not revised by

the superior court and has not been challenged on appeal. Rather, Joe insists that its plain language requires the protection order be vacated minimally as to Kendra, the subject of the 2014 incident. As the commissioner concluded that Joe "lacked the appropriate parenting skills to manage his frustration with his children," it is to be emphasized that whatever was the allegation of Joe's yelling directly at Kendra in 2014, there is nothing similar in 2015 as to Megan.

### 3. The proper standard is the present condition of the parent for purposes of determining if a DVPO is necessary; the 2012 allegation is irrelevant.

A DVPO in this parenting context necessarily interferes with Joe's relationship with his daughters and his custody rights as a presumptively fit parent. The test of whether Joe's fitness to maintain his relationship with his daughters, as well as his rights as a parent, should be immediately interfered with on an expedited, minimalist hearing must be based on his "present condition . . . and not any . . . past conduct," no less than in a permanent custody deprivation proceeding, since the focus is the same: what does the child need now, and is the proposed restraint necessary to protect the child? *See, e.g., In re Custody of ALD,* 191 Wn. App. 474, 506 ¶94, 363 P.3d 604 (2015) (in custody determination, the mother's "current [mental] stability controls. The test of fitness of custody is the present condition of the mother and not any future or past

conduct," reversing the grant of grandparents' non-parental custody petition and dismissing the petition).[11]

While the decision is in the context of nonparental custody cases, *Custody of ALD* also states the predicate principles that underlie all custody decisions – even between parents – and the care that is required of the courts in refereeing between competing parents or third parties over custody or control of children. The presumptively fit parents, each of them, have fundamental constitutional rights in raising their children with a minimum of State interference.[12] The basis for State interference arises on a showing of a compelling State interest,[13] including when a parent's

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[11] *Accord, e.g., In re Marriage of Nordby*, 41 Wn. App. 531, 534, 705 P.2d 277 (1985) (error for trial court to award custody of 14-year-old daughter to mother based on speculative projection her mental illness history would go into remission in the future: test of the parent's fitness is their "present condition" rather than future or past conduct).

[12] *Custody of ALD*, 191 Wn. App. at 495-96 (internal citations omitted):

> Parents have a fundamental right to autonomy in child rearing decisions. . . . The United States Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without state interference. . . . The liberty interest of parents may be the oldest of the fundamental liberty interests recognized by the Supreme Court. . . . Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the due process clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.
>
> Despite many parents being untrained, unprepared, and inept in the art and science of raising a child, American law recognizes a natural right attached to the biological processes of siring and bearing a child. This right precedes law. The rights to conceive and to raise one's children are deemed "essential," " 'basic civil rights of man.' ". The custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.

[13] *Custody of ALD,* 191 Wn. App. at 496-97, (internal citations omitted):

> Since the custody of a child is a fundamental, constitutional right, state interference is justified only if the State can show that it has a compelling

*(Footnote continued next page)*

decisions or actions would harm the child. *Custody of ALD,* 191 Wn. App. at 495-498, esp. ¶¶66-68.

In sum, and as is particularly pertinent here, established law precludes the State through its courts from micro-managing parental decisions. Presumptively fit parents do not have to be perfect parents, nor parents who parent in the style desired by the courts. *Id.*[14] They are presumed to act in their children's best interests and only when they place them at a genuine risk of current and likely harm is the court justified in restricting their rights. Justice Gordon McCloud recently analyzed the governing statutory and underlying legal principles in *Marriage of Chandola, supra,* 180 Wn.2d at 644-648 to conclude that restrictions on an otherwise fit parent may only be applied under the catch-all provision of RCW 26.09.101(3)(g):

> ***. . . where necessary to 'protect the child from physical, mental, or emotional harm,'*** RCW 26.09.002, similar in

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interest and such interference is narrowly drawn to meet only the compelling state interest involved. . . .

The State may interfere and override a decision of a parent when the decision would harm the child. . . . Both the State's *parens patriae* power and police power provide the State with the authority to act to protect children lacking the guidance and protection of fit parents of their own. . . . Conversely, short of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights. . . . Only under "extraordinary circumstances" does there exist a compelling state interest that justifies interference with parental rights.

[14] *Custody of ALD*, 191 Wn. App. at 497:

The State lacks authority to redistribute infants to provide each child with the "best family," *Custody of Smith*, 137 Wn.2d [1] at 20 [, 969 P.2d 21 (1998)]. The State also lacks the power to make significant decisions concerning the custody of children merely because it could make a "better decision." *Custody of Smith*, 137 Wn.2d at 20.

> severity to the harms posed by the 'factors' specifically listed in RCW 26.09.191(3)(a)-(f). A trial court abuses its discretion if it imposes a restriction that is not reasonably calculated to prevent such harm.

*Chandola,* 180 Wn.2d at 648 (emphasis added). *Chandola* also demonstrates the DVPO must be vacated.

### D. The Trial Court Abused Its Discretion By Failing To Allow Joe Adequate Time To Present His Evidence And Cross-Examine Julie's Witnesses At The DVPO Hearing By Arbitrarily Limiting It To One Hour Per Side.

As noted *supra*, hearings for DVPOs are conducted as "special proceedings." As such, the extent of limits placed on such hearings is reviewed for an abuse of discretion. *Schreib v. Crosby,* 160 Wn. App. at 352-353.[15]

Here the abuse of discretion by the Commissioner was in how he held the hearing, using an arbitrary measure to limit the hearing and exclude important evidence necessary for a proper hearing that would fulfill the purpose of the DVPA. That limitation only makes sense if the goal is to simply get done with some sort of a hearing before granting pre-ordained protection order, as opposed to having a fair hearing.

While our cases have limited the constitutional elements of due process which are ***required*** in a given DVPO hearing, they have

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[15] The same standards on abuse of discretion apply as noted above: it is an abuse if the decision is manifestly unreasonable, untenable, made on an untenable basis, or for untenable reasons, *Marriage of Littlefield*, 133 Wn.2d at 47; and a trial court abuses its discretion if it bases its decision on an incorrect legal standard. *Fisons*, 122 Wn.2d 299 at 339.

affirmed that the hearing nevertheless has to be a fair one. *Schreib; Gourley*. And to be fair it cannot be subject to arbitrary time limits which exclude evidence that is material and necessary for the trial court to get to the truth. Rather, the trial court has discretion for just that purpose, to insure that the necessary amount of time and number of witnesses, or discovery are provided as is needed under the circumstances. Here the commissioner did not exercise discretion. He simply applied his own rule: one hour per side, one size fits all. Because discretion was not exercised by the trial court, it abused its discretion and the DVPO must be vacated on that basis as well.

## V. CONCLUSION

The commissioner was correct to focus only on the recent March 15, 2015 "homework incident" four days later on March 19. He was also correct when he found on June 24 that it was "***not*** an event that would have lead a reasonable individual to believe they were at risk of imminent bodily harm." FOF 9, CP 216 (emphasis added). Where he erred was in concluding the March 15 "homework incident" constituted domestic violence under the law, since his finding meant that it did ***not*** meet the statutory definition. He also erred in considering earlier incidents that did not show any imminent risk in 2015. The commissioner erred by, in effect, allowing a premature hearing on modification on May 20 and 27 instead of focusing on whether, given the March 15 "homework incident," immediate relief was necessary to protect the one daughter

at issue pending the modification action which by then was started. This court should vacate the DVPO and instruct the lower courts to place clear, strict limits on the scope of DVPO hearings so as not to corrupt and pre-determine intended modification proceedings. That is what is required to be fair to both the opposing parent and the child or children in question, and their relationship.

Joe Brannberg therefore respectfully asks the Court to vacate the DVPO entered below.

Dated this 17th day of May, 2016.

**CARNEY BADLEY SPELLMAN, P.S.**

By _____
Gregory M. Miller, WSBA No. 14459

*Attorneys for Appellant*

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of Opening Brief of Appellant Joe Brannberg – corrected - and Appendix A on the below-listed attorneys of record by the methods noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

| | |
|---|---|
| Robert Martin Morgan Hill<br>Morgan Hill PC<br>2102 Carriage Dr SW Bldg C<br>Olympia WA 98502-1049<br>rob@morganhill-law.com | Patrick W. Rawnsley<br>PWR Law, PLLC<br>1411 State Ave NE Ste 102<br>Olympia WA 98506-4467<br>pat@pwr-law.com |

DATED this 18th day of May, 2016.

Catherine A. Norgaard, Legal Assistant

# APPENDIX A

4



**SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY
FAMILY & JUVENILE COURT**

In Re:
Julie Brannberg

Petitioner,

and

Joseph Brannberg

Respondent.

**NO. 15-2-30198-2**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DVPO**

## I. BASIS

This matter came before the court for hearing on the 20th and 27th of May, 2015. Both parties were present and represented by their respective counsel. The Court having reviewed all relevant pleadings and considered the arguments of counsel, makes the following:

## II. FINDINGS/CONCLUSIONS OF LAW

1. The parties are the parents of four minor children, Moriah (16), Kendra (13), Megan (11), and Kaelyn (8).

2. A Final Parenting Plan was issued on June 3, 2009, (See Brannberg v. Brannberg 09-3-00024-8) which provided for an equal parenting time scheduled wherein the parties exchange the children every Sunday at 6:00 pm

3. There were no findings pursuant to 26.09.191 issued in the June 2009 Parenting Plan.



THURSTON COUNTY SUPERIOR COURT
FAMILY & JUVENILE COURT
Mail: 2000 Lakeridge Dr. SW, Olympia, WA 98502
Location: 2801 32nd Avenue SW, Tumwater
Tele: (360)709-3201 - Fax: (360)709-3256
CLERK'S OFFICE: (360)709-3260

4. Ms. Brannberg filed a Petition for Domestic Violence Protective Order on March 19, 2015. She also asked that any Protective Order include 2 of the children, Kendra and Megan. She did not ask that the Order include Moriah or Kaelyn.

5. In the Petition, Ms. Brannberg alleged that there had been an incident wherein Megan was having trouble with her homework and Mr. Brannberg made her sit and do her homework until it was done and that in frustration he pounded on the kitchen table with a fist. He then left the table and stated something like "I am so angry I could kick the f. . .'ing wall." (There is differing testimony between the parties as to what "f" word was used. The court finds the distinction irrelevant.) Mr. Brannberg, while slightly differing in the context of the incident, provided his own testimony that was consistent with this recitation.

6. Megan was diagnosed with leukemia when she was 2 years old and underwent chemotherapy which resulted in mental and social development issues.

7. Ms. Brannberg also alleges that in August of 2014, Mr. Brannberg was yelling at Kendra and as a result of this incident, Kendra wrote a suicide note and pills and razors were found on the floor of Kendra's room. Shortly thereafter, the parties stipulated to Kendra living full-time with her mother.

8. Ms. Brannberg also alleged that in 2012 or 2013 (petition says either or, the testimony was that it occurred in August of 2012) Mr. Brannberg became angry with Kendra and put his hands around her neck to lift her up. Ms. Hicks, Kendra's counselor, confirmed that the child reported being choked by her father around this time. Mr. Brannberg denies this incident.

9. The court finds that the incident in May of 2015 does constitutes domestic violence. The incident was disturbing to the children and even by Mr. Brannberg's testimony constitutes an inappropriate response to a frustrating situation, it is not an event that would have lead a reasonable individual to believe they were at risk of imminent bodily harm.

10. The court finds that the incident from August of 2014 does not constitute domestic violence. It appears that in this situation Mr. Brannberg lacked the appropriate parenting skills to manage his frustration with his children.



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11. The court does find that the incident from August of 2012 constitutes domestic violence. The court concludes that there is a preponderance of evidence to believe that the incident occurred. There is the testimony of Ms. Brannberg and the testimony of Ms. Hicks which indicates that the child reported the incident to both her mother and her therapist. This corroborating testimony, while admissible hearsay, does lead credence to the conclusion that the event more likely than not occurred.

12. Kendra was 11 years old at the time. At this age, corporal punishment has a limited value. Additionally, the grabbing of the neck, instead of a spanking, is a particularly concerning form of corporal punishment that rises to the level of an assault. It is reasonable, considering Mr. Brannberg's admitted inability to address his anger and frustration in a productive manner in May of 2015 that the child would have a reasonable ongoing fear of physical violence.

13. The court notes that Mr. Rawnsley made a number of evidentiary objections during the hearing. The objections based upon hearsay are overruled as the rules of evidence are relaxed in DV proceedings. There were also a number of objections made by Mr. Rawnsley that were outlined initially in his Motion in Limine filed on May 20, 2015. The essence of these objections revolve around whether the Declarations of Ms. Toney, Ms. Hicks, and Ms. Clarke.

14. The court heard testimony from all three. Further, Kendra, after consultation with counsel, withdrew her release as to her counselor, Ms. Clarke. Therefore Ms. Clarke's testimony is excluded and not considered for purposes of the Conclusions of Law in this matter. As to the testimony of Ms. Hicks and Ms. Toney, the court finds that the testimony is admissible.

15. However, even if the court were to disregard the testimony of Ms. Hicks and Ms. Toney, the court finds there is sufficient evidence to conclude that the event in March of 2015 and the incident in August of 2012 occurred, constitute domestic violence and are each individually basis's to issue a protective Order. Additionally, the incident of August of 2014



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probably constitute an act of domestic violence placing Kendra in immediate fear of imminent bodily harm.

Based upon the foregoing Findings/Conclusions of Law, the Court enters the following:

II. CONCLUSIONS OF LAW

1. There is a basis to enter a Protective Order on behalf of Kendra.

2. There is a basis to enter a Protective Order on behalf of Megan.

III. ORDER

IT IS ORDERED that:

1. The court shall issue a Domestic Violence Protective Order consistent with these Findings of Fact and Conclusions of Law.

DATED this 24th day of June 2015.

COURT COMMISSIONER LACK



THURSTON COUNTY SUPERIOR COURT
FAMILY & JUVENILE COURT
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STATE OF WASHINGTON
County of Thurston
I, Linda Myhre Enlow, County Clerk and Ex-officio Clerk of the Superior Court of the State of Washington, for Thurston County holding session at Olympia, do hereby certify that the following is a true and correct copy of the original as the same appears on file and of record in my office containing -- 5 -- pages,
IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court
DATED: _____
LINDA MYHRE ENLOW
County Clerk, Thurston County, State of Washington
by _____Deputy

FILED
SUPERIOR COURT
THURSTON COUNTY, WA
2015 JUN 24 PM 3:08
Linda Myhre Enlow
Thurston County Clerk

**Superior Court of Washington**
**For Thurston County**
**Family and Juvenile Court**

# Order for Protection

**No. 15-2-30198-2**

Court Address: 2801 32nd Avenue SW
Tumwater, WA 98512
Phone Number: (360)709-3267 or (360)709-3268
(Clerk's Action Required) (ORPRT)

**JULIE LYN BRANNBERG, DOB** [redacted]
Petitioner (First, Middle, Last Name)
v.
**JOSEPH GERRIT BRANNBERG, DOB** [redacted]
Respondent (First, Middle, Last Name)

**Names of Minors:** ☐ **No Minors Involved**

| First | Middle | Last | Age |
|---|---|---|---|
| KENDRA | NICOLE | BRANNBERG | 13 |
| MEGAN | CHARIS | BRANNBERG | 11 |

**Respondent Identifiers**

| Sex | Race | Hair |
|---|---|---|
| Male | White | GRY |
| Height | Weight | Eyes |
| 5'9" | 150 | BLU |

**Respondent's Distinguishing Features:**
Respondent has unknown distinguishing features.

**Caution: Access to weapons:** ☐ **yes** ☐ **no** ☐ **unknown**

## *The Court Finds Based Upon the Court Record:*

The court has jurisdiction over the parties, the minors, and the subject matter and respondent has been provided with reasonable notice and an opportunity to be heard. Notice of this hearing was served on the respondent by
☒ personal service ☐ service by mail pursuant to court order ☐ service by publication pursuant to court order
☐ other .

This order is issued in accordance with the Full Faith and Credit provisions of VAWA: 18 U.S.C. § 2265.

Respondent's relationship to the petitioner is:
☒ spouse or former spouse ☐ current or former dating relationship ☐ in-law ☐ parent or child
☒ parent of a common child ☐ stepparent or stepchild ☐ blood relation other than parent or child
☐ current or former cohabitant as intimate partner including current or former registered domestic partner ☐ current or former cohabitant as roommate

Respondent committed domestic violence as defined in RCW 26.50.010 and represents a credible threat to the physical safety of petitioner; the court concludes as a matter of law the relief below shall be granted.

## *Court Order Summary:*

☒ Respondent is restrained from committing acts of abuse as listed in restraint provisions 1 and 2, on page 2.
☒ No-contact provisions apply as set forth on the following pages.
☐ Additional provisions are listed on the following pages.

**The terms of this order shall be effective immediately and for one year from today's date, unless stated otherwise here (date):**

FAXED/COPY TO Tumwater PD
(Law Enforcement Agency where Petitioner resides for input into statewide computer system)
Deputy Clerk's Initials JA

***It is Ordered:***

☒ 1. Respondent is ***Restrained*** from causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking ☐ petitioner ☒ the minors named in the table above ☐ these minors only:

(If the respondent's relationship to the petitioner is that of spouse or former spouse, parent of a common child, or former or current cohabitant as intimate partner, including current or former registered domestic partner, then effective immediately, and continuing as long as this protection order is in effect, the **respondent may not possess a firearm or ammunition**. 18 U.S.C. § 922(g)(8). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a $250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. § 925(a)(1).)

☒ 2. Respondent is ***Restrained*** from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, locations, or wire or electronic communication of ☐ petitioner ☒ the minors named in the table above ☐ only the minors listed below ☐ members of the victim's household listed below ☐ the victim's adult children listed below:

☐ 3. Respondent is ***Restrained*** from coming near and from having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by Respondent's lawyer(s) with ☐ petitioner ☐ the minors named in the table above ☐ these minors only:

If both parties are in the same location, respondent shall leave.

☒ 4. Respondent is ***Excluded*** from petitioner's ☒ residence ☐ workplace ☐ school; ☒ the day care or school of ☒ the minors named in the table above ☐ these minors only:

☐ Other

☐ Petitioner's address is confidential. ☒ Petitioner waives confidentiality of the address which is: 1113 Sleater Kinney Rd, SE Lacey WA 98503

☐ 5. Petitioner shall have exclusive right to the residence that petitioner and respondent share. The respondent shall immediately ***Vacate*** the residence. The respondent may take respondent's personal clothing and tools of trade from the residence while a law enforcement officer is present.

☐ This address is confidential. ☐ Petitioner waives confidentiality of this address which is:

☒ 6. Respondent is ***Prohibited*** from knowingly coming within, or knowingly remaining within **500 feet** (distance) of: petitioner's ☒ residence ☐ workplace ☐ school; ☒ the day care or school of ☒ the minors named in the table on page one ☐ these minors only:

☐ Other:

☐ 7. Petitioner shall have possession of essential personal belongings, including the following:

☐ 8. Petitioner is granted use of the following vehicle:
Year, Make & Model License No.

☐ 9. Other:

☒ 10. Respondent shall participate in treatment and counseling as follows:
☐ domestic violence perpetrator treatment program approved under RCW 26.50.150 or counseling at:
☒ parenting classes at: **with MRT component to begin within 30 days**
☐ drug/alcohol treatment at: (to be monitored in parenting plan action)
☐ other:

☐ 11. Petitioner is granted judgment against respondent for $ fees and costs.

☐ 12. Parties shall return to court on . at **, a.m./p.m.** for review.

**Complete only if the protection ordered involves pets:**

☐ 13. Petitioner shall have exclusive custody and control of the following pet(s) owned, possessed, leased, kept, or held by petitioner, respondent, or a minor child residing with either the petitioner or the respondent. (Specify name of pet and type of animal.):

☐ 14. Respondent is ***Prohibited*** from interfering with the protected person's efforts to remove the pet(s) named above.

☐ 15. Respondent is ***Prohibited*** from knowingly coming within, or knowingly remaining within (distance) of the following locations where the pet(s) are regularly found:
☐ petitioner's residence (You have a right to keep your residential address confidential.)
☐ Park
☐ other:

**Complete only if the protection ordered involves minors:** This state ☐ has exclusive continuing jurisdiction; ☐ is the home state; ☐ has temporary emergency jurisdiction ☐ that may become final jurisdiction under RCW 26.27.231(2); ☐ other:

☒ 16. Petitioner is ***Granted*** the temporary care, custody, and control of ☒ the minors named in the table above ☐ these minors only:

☒ 17. Respondent is ***Restrained*** from interfering with petitioner's physical or legal custody of ☒ the minors named in the table above ☐ these minors only:

☒ 18. Respondent is ***Restrained*** from removing from the state ☒ the minors named in the table above ☐ these minors only:

☒ 19. The respondent will be allowed visitations as follows: parenting time as may be ordered in Case No 09-3-00024-8

Petitioner may request modification of visitation if respondent fails to comply with treatment or counseling as ordered by the court.

**If the person with whom the child resides a majority of the time plans to relocate the child, that person must comply with the notice requirements of the Child Relocation Act. Persons entitled to time with the child under a court order may object to the proposed relocation. See RCW 26.09, RCW 26.10 or RCW 26.26 for more information.**

***Warnings to the Respondent:*** A violation of provisions 1 through 6 of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject you to arrest. If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, you may be subject to criminal prosecution in federal court under 18 U.S.C. §§ 2261, 2261A, or 2262.

A violation of provisions 1 through 6, 14, or 15 of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. Also, a violation of this order is a class C felony if you have at least two previous convictions for violating a protection order issued under Titles 7, 10, 26 or 74 RCW.

If you are convicted of an offense of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(9); RCW 9.41.040.

***You Can Be Arrested Even if the Person or Persons Who Obtained the Order Invite or Allow You to Violate the Order's Prohibitions.*** You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

## WACIC Data Entry

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to Tumwater ☐ County Sheriff's Office ☒ Police Department ***Where Petitioner Lives*** which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

## Service

☐ The clerk of the court shall also forward a copy of this order on or before the next judicial day to _____ ☐ County Sheriff's Office ☐ Police Department ***Where Respondent Lives*** which shall personally serve the respondent with a copy of this order and shall promptly complete and return to this court proof of service.

☐ Petitioner shall serve this order by ☐ mail ☐ publication.

☒ Petitioner shall make private arrangements for service of this order.

☐ Respondent appeared and was informed of the order by the court; further service is not required.

☐ Law enforcement shall assist petitioner in obtaining:

- ☐ Possession of petitioner's ☐ residence ☐ personal belongings located at: ☐ the shared residence ☐ respondent's residence ☐ other:
- ☐ Custody of the above-named minors, including taking physical custody for delivery to petitioner.
- ☐ Possession of the vehicle designated in paragraph 8, above.
- ☐ Other:

☐ Other:

***This Order is in Effect Until the Expiration Date on Page One.***

If the duration of this order exceeds one year, the court finds that an order of one year or less will be insufficient to prevent further acts of domestic violence.

Dated: 6/24/15 at 2:30, a.m./p.m.

**Judge/Commissioner**

Presented by:

I acknowledge receipt of a copy of this Order:

Petitioner Attorney for Petitioner #42425 6/24/15 Date

Respondent Date

**The petitioner or petitioner's lawyer must complete a Law Enforcement Information Sheet (LEIS).**

# CARNEY BADLEY SPELLMAN

## May 18, 2016 - 7:58 AM

**Transmittal Letter**

Document Uploaded: 5-481791-Other Brief.pdf

Case Name: re Brannberg
Court of Appeals Case Number: 48179-1

**Is this a Personal Restraint Petition?** Yes ■ No

## The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Other__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

**Comments:**

Corrected Opening Brief of Joe Brannberg with App A and certificate of service

Sender Name: Patti Saiden - Email: norgaard@carneylaw.com